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should be indulged in favor of legitimacy, and, in doubtful cases, in support of the judgment of the trial court.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 336.]

Appeal from Circuit Court, Rockingham County.

On rehearing. Former opinion reversed, and judgment below affirmed.

For former opinion, see 105 S. E. 91.

*C. R. Winfield*, of Broadway, and *John T. Harris*, of Harrisonburg, for appellants.

*Ward Swank*, of Harrisonburg, for appellee.

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A. S. WHITE & CO., Inc. v. RYAN.

Nov. 17, 1921.

[109 S. E. 426.]

**1. Limitation of Actions (§ 195 (4)\*)—Burden on Plaintiff to Prove Nonresidence.**—In action on contract instituted in March, 1921, where defendant pleaded the three-year statute of limitations and showed that contract was made in August, 1916, the burden was then cast upon the plaintiff to prove the fact of nonresidence of the defendant between such dates.

**2. Pleading (§ 339\*)—Plea Not Waived by Failure to Call to Attention of Jury.**—Where defendant pleaded statute of limitations, and it appeared on trial that limitations had run, the fact that the question of limitations was not specifically called to the attention of the jury did not change the pleadings, and it cannot be inferred therefrom that defendant withdrew or waived his plea of limitations.

Error to Circuit Court, Nelson County.

Action by A. S. White & Co., Inc., against Thomas F. Ryan. Judgment for defendant, and plaintiff brings error. Affirmed.

*Caskie & Caskie*, of Lynchburg, for plaintiff in error.

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LYNCH v. COMMONWEALTH.

Nov. 17, 1921.

[109 S. E. 427.]

**1. Assault and Battery (§ 48\*)—Battery Includes Assault.**—A battery accompanies and includes an assault.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 730.]

**2. Assault and Battery (§ 48\*)—Intended Injury May Be to Feelings or Mind; "Battery."**—A "battery" is the unlawful touching of

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.